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No. 87 - 1701

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

RICHARD L. DUGGER,

Petitioner,

- v -

CHARLES KENNETH FOSTER,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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This brief is submitted by respondent Foster in opposition to the petition for writ of certiorari filed by the State of Florida through petitioner Richard L. Dugger.

COUNTER-STATEMENT OF THE CASE

Petitioner has grossly misrepresented and distorted the claim upon which Mr. Foster prevailed in the Florida Supreme Court, the record facts material to that claim, and the Florida Supreme Court's opinion. These matters will be addressed in the next section of Mr. Foster's brief.

REASONS FOR DENYING CERTIORARI

In his attempt to present a question worthy of the Court's review, petitioner has resorted to sheer fantasy. He has distorted beyond recognition the claim presented by Mr. Foster, the record facts material to that claim, and the Florida Supreme Court's analysis of the claim. When these matters are considered in light of the actual record of the Florida Supreme Court proceeding, it is manifest that Mr. Foster's case presents no question worthy of review.

Mr. Foster's claim before the Florida Supreme Court was a straightforward claim under Hitchcock v. Dugger, __U.S.__, 95 L.Ed.2d 347 (1987). He argued that the penalty phase instructions precluded the jury from considering evidence of nonstatutory mitigating circumstances and that the trial judge failed to consider that same evidence in the course of determining his sentence. See generally, Petition for Writ of Habeas Corpus (Supreme Court of Florida), attached hereto as Appendix A. He pointed to the evidence before the jury and judge which established three nonstatutory mitigating circumstances: his long history of mental illness and the failure of mental health institutions to provide appropriate treatment, Appendix A at 12; his intoxication at the time of the murder, id.; and his remorse for the commission of the murder. Id.

Notwithstanding Mr. Foster's unambiguous pleading of this claim, petitioner has argued that the claim complains of the jury's and judge's failure to consider nonstatutory mitigating circumstances which were not offered into evidence. Petitioner provides no citation to the trial record or to the Florida Supreme Court's opinion to support this characterization, because there is no support for it. Mr. Foster's claim focused exclusively upon the nonstatutory mitigating circumstances supported by the evidence admitted at trial. See Appendix A, at 12 (citing the trial transcript to show the record basis for the nonstatutory mitigating circumstances). His claim in no respect

relied upon, or even referred to, mitigating circumstances which had not been presented in the evidence admitted at trial. Petitioner's characterization of the claim otherwise is a direct misrepresentation.[1]

To bolster this misrepresentation, petitioner distorts the trial record as well. He argues that Mr. Foster personally prevented the preparation and presentation of the mitigating evidence which he (Mr. Foster) now claims was not considered. This argument rests upon two false premises: first, that evidence of nonstatutory mitigating circumstances was not before the jury and judge, and second, that Mr. Foster must bear responsibility for the omission that evidence. We have already shown that the first premise is belied by the trial record, for the record reveals that there was evidence presented at trial which could have led the jury or judge to find three nonstatutory mitigating circumstances.

The inaccuracy of the second premise is most concisely demonstrated by the findings of the Eleventh Circuit in its most recent decision on Mr. Foster's ineffective assistance of counsel claim. These findings reveal that despite Mr. Foster's disagreement with counsel over the pursuit of a mental illness defense, counsel pursued it anyway:

> The trial began on October 1, 1975. Foster's case rested entirely on his own testimony. Foster was planning to suggest that one of

---

[1]In other proceedings independent of the original habeas corpus proceeding in the Florida Supreme Court that is the subject of the instant certiorari petition, Mr. Foster has complained of his trial lawyer's ineffective assistance in failing to present the evidence that was most material to the mental illness mitigating circumstance. See Appendix to Petition for Writ of Certiorari herein, at A-17 et seq. In those proceedings, however, Mr. Foster has never argued that defense counsel presented no evidence of mental illness. Rather, he has argued that defense counsel has failed to present the best, most material evidence of mental illness -- which would have established statutory mitigating circumstances had it been presented. In so arguing, Mr. Foster has always acknowledged that his trial counsel did present some evidence of mental illness which had mitigating value. It is this evidence, along with evidence of intoxication and remorse, that has always formed the basis for Mr. Foster's Lockett claim, which he litigated in his first state post-conviction and federal habeas corpus proceedings (1981-84) and which he relitigated in state habeas after Hitchcock was decided.

> the women committed the homicide. In the middle of this testimony, however, Foster broke down and made a dramatic witness stand confession consistent with his earlier confession to the police. Following this confession, the jury convicted Foster of murder in the first degree and robbery. The sentencing phase commenced immediately thereafter.
>
> During the penalty phase, Mayo pursued a strategy Foster had earlier rejected: to defend on the basis of Foster's mental and emotional state at the time of the crime. The mitigating evidence Mayo presented to the jury consisted of the testimony of two witnesses and documents pertaining to Foster's two involuntary commitment proceedings.

Petition for Writ of Certiorari herein, at A-19 and A-20 (footnotes omitted).

Accordingly, Mr. Foster cannot be held responsible for "waiving" the presentation of nonstatutory mitigating evidence. Contrary to petitioner's distortion, such evidence was presented, and it was presented despite Mr. Foster's once-expressed desire that it not be.

In a further variation on this "waiver" theme, petitioner argues that in any event, Mr. Foster asked to be sentenced to death. Whatever the implication might be if a capital did make such a request, those implications need not be considered here, for Mr. Foster made no such request. Petitioner has again distorted the trial record.

At no point in the trial did Mr. Foster ask to be sentenced to death. After the jury recommended that he be sentenced to death, Mr. Foster did reveal an uncommon willingness to bear responsibility for his actions. In response to the judge's giving him the opportunity to speak before sentence was pronounced, he said,

> I just want to, you know, some way to let the jury know that I don't, that I am not mad about them coming with a verdict to sentence me to death because from the evidence shown I didn't show that man no mercy, you know. I was drunk but, when it happened, but that, being drunk ain't no excuse.

T. 657. Mr. Foster reiterated these feelings at the very end of the trial:

> I would like to ask any of the family of Mr. Lanier present, I believe they are. I would like to, you know, tell them that I sure hated that it happened because I wouldn't have ever hurt that fellow if I had been sober but being drunk ain't no excuse.

T. 661-62.

These honest expressions of remorse and of acceptance of the consequences of his actions can in no way be equated with Mr. Foster's asking that he be sentenced to death. While these expressions reveal a potential for rehabilitation that is mitigating -- and indeed is a nonstatutory mitigating circumstance that the trial judge should have considered -- they cannot be taken as petitioner construes them: as an affirmative desire to be sentenced to death that would have negated or counterbalanced appropriate consideration of mitigating circumstances. No such desire was ever expressed by Mr. Foster in the course of his trial.

Finally, petitioner has fundamentally distorted the Florida Supreme Court's reasoning in granting relief to Mr. Foster under Hitchcock and Lockett. Petitioner has argued that the Florida Court granted relief mechanically, based upon a misperception of the requirements of Hitchcock, upon seeing the "talismanic" instructions condemned in Hitchcock. As with so many of petitioner's arguments, this argument also misrepresents what occurred in the court below. Far from granting relief mechanically upon seeing "talismanic" instructions, the Florida Supreme Court considered all of the indications in the record that the trial judge had restricted his own consideration of mitigating circumstances and, deciding that he had done so, determined that for this reason alone Mr. Foster should be resentenced:

> The fact that the judge, the ultimate sentencing authority, did not consider nonstatutory mitigating evidence settles the issue because there was some nonstatutory mitigating evidence that the Court could have considered.

Petition for Writ of Certiorari herein, at A-7.[2]

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[2]Petitioner's argument that the Florida Supreme Court mechanically applied Hitchcock extended to his belief that the Florida Supreme Court refused to consider whether the Lockett

Petitioner further argues that, despite the Florida Court's finding that "there was some nonstatutory mitigating evidence that the court could have considered," id., there really was no such evidence. Even if petitioner's contention were true, it is hard to imagine why a state supreme court's erroneous characterization of evidence as nonstatutory mitigating evidence is a question worthy of this Court's review. Nevertheless, the Florida Supreme Court's characterization of the evidence was not erroneous. It has previously recognized that while evidence of mental illness and intoxication may fall short of establishing any statutory mitigating circumstances, the evidence may nevertheless establish nonstatutory mitigating circumstances. See, e.g., Huddleston v. State, 475 So.2d 204 (Fla. 1985) (troubled personal life, including suicidal impulses, depression and deep frustration, are valid nonstatutory mitigating factors); Amazon v. State, 487 So.2d 8 (Fla. 1986) (personality disturbance is valid nonstatutory mitigating factor); Moody v. State, 418 So.2d 989 (Fla. 1982) (same). Indeed, the court has expressly recognized that where mental disturbance is not so extreme or disabling as to establish the statutory mental mitigating circumstances, it should nevertheless be considered as a nonstatutory mitigating circumstance. See Johnson v. State, 438 So.2d 774, 779 (Fla. 1985). Further, it has recognized that expression of remorse may establish a potential for rehabilitation, which is a nonstatutory mitigating circumstance. See Simmons v. State, 419 So.2d 316 (Fla. 1982); Magill v. State, 386 So.2d 1188 (Fla. 1980).[3] Accordingly, the Florida Supreme Court's acknowledgment that "there was some nonstatutory mitigating evidence that the

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error was harmless. The record refutes this argument as well, for the court acknowledged that "Hitchcock left open the possibility of harmless error," but noted that this was "an issue the state did not brief in this case." Petition for Writ of Certiorari herein, at A-8 n.3.

[3]Petitioner's argument that Mr. Foster's expression of remorse was never proffered as a mitigating circumstance is belied by the record, for as we have already noted, this evidence was evoked by the trial judge's giving Mr. Foster the opportunity "to say why the judgment of the Court and sentence of the law should not now be pronounced upon you[.]" T.656.

court could have considered" was nothing more than a faithful application of settled state law to the facts of Mr. Foster's case.

When petitioner's distortions of this case are removed, it is thus abundantly clear that the case presents no question worthy of review. The Florida Supreme Court applied Hitchcock and Lockett thoughtfully and faithfully, without expanding the rule of either case, to a set of facts squarely controlled by Hitchcock. No more and no less should be expected of the state courts in our federal system.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,	:	
	:	
Petitioner,	:	
	:	
vs.	:	
	:	CASE NO. _____
RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,	:	
	:	
Respondent.	:	
	:	

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION AND STATEMENT OF JURISDICTION

1. This Court's original jurisdiction is invoked pursuant to Rule 9.030(a)(3), Fla.R.App.P. (1977). As allowed under Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986), Mr. Foster asks the Court to utilize its habeas corpus jurisdiction to re-examine its prior appellate judgment in his post-conviction proceedings.

2. In May, 1981, the Court affirmed the denial of Mr. Foster's Rule 3.850 motion. Foster v. State, 400 So.2d 1 (Fla. 1981). In that motion Mr. Foster claimed, inter alia, that during the course of his 1975 trial the judge had restricted the jury's and his own consideration of mitigating circumstances in violation of Lockett v. Ohio, 438 U.S. 586 (1978). Mr. Foster did not object to the error at trial, nor present it on direct appeal. The Court held that the error was not a proper subject for a post-conviction motion since it could have and should have been raised on direct appeal. 400 So.2d at 4.

3. Since then, the Court has changed its view on this matter and has decided that this error can be a proper subject for a post-conviction motion even though it was not raised at trial or on direct appeal. In Copeland v. Wainwright, ___ So.2d ___, 12 F.L.W. 178 (April 9, 1987), the Court recognized, as it had in Harvard v. State, 486 So.2d 537 (Fla. 1986), that prior to its decision in Songer v. State, 365 So.2d 696 (Fla. 1978) and the United States Supreme Court's decision in Lockett v. Ohio, "the Florida death penalty sentencing law could . . . have been read to limit the consideration of mitigating factors to those circumstances listed in the statute." 12 F.L.W. at 179. In cases tried after Lockett and Songer, when "the Florida statute had clearly been construed to permit consideration of nonstatutory mitigating circumstances, consistent with the dictates of Lockett[,] . . . any confusion in the law had been resolved and clarified." Id. In these cases Lockett error plainly could have been raised at trial and on appeal, and thus,

in these cases, Lockett error could not be raised for the first time in a post-conviction motion. Id. However, Copeland teaches as well that in cases tried before Lockett -- at a time when there was "confusion in the law" -- errors which would later be deemed Lockett error reasonably might not have been raised at trial or on direct appeal. For this reason, the Court recognized that in these cases Lockett error could be raised for the first time in a Rule 3.850 motion. Accord Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987).[1]

4. Mr. Foster's case was tried in October, 1975.[2] Accordingly, under the teaching of Copeland and Aldridge, he was entitled to raise the Lockett error for the first time in his Rule 3.850 motion. His failure to have raised the error at trial or on appeal should not have been treated as a default. Nevertheless, when Mr. Foster raised the Lockett error in his Rule 3.850 motion, this Court held that the error was not cognizable because it could have and should have been raised on direct appeal.

5. The Court should entertain the instant petition in order to remedy this error in its appellate judgment. While the Court's original habeas jurisdiction is generally not "a vehicle for obtaining a second determination of matters previously decided on appeal," Messer v. State, 439 So.2d 875, 879 (Fla. 1983), in very narrow circumstances, it is a vehicle for reconsidering matters previously decided on appeal. "It is only

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[1]In Aldridge, where the trial occurred in 1975, the Court recognized that although Aldridge could not be faulted for not having raised the Lockett error at trial or on direct appeal--his appeal having been decided in 1977 -- he could be faulted for not having raised the Lockett error in his first Rule 3.850 motion, which was filed after Lockett was announced. "Aldridge had an opportunity to raise the issue after Lockett in prior [Rule 3.850] proceedings and has failed to do so." 503 So.2d at 1259.

[2]Although the Court announced its opinion on Mr. Foster's direct appeal several months after the Lockett decision and two months after the Sorger decision, the appeal had been briefed, argued, and submitted for decision well before the decision in Lockett. Thus, there was no meaningful opportunity to present the Lockett error on appeal. In addition, the error had not been raised at trial; even if there had been an opportunity to present the error on appeal, the lack of objection would have foreclosed review. Maxwell v. State, 490 So.2d 927, 934 (Fla. 1986).

in the case of error that prejudicially denies fundamental constitutional rights that this Court will revisit a matter previously settled by the affirmance of a conviction or sentence." Kennedy v. Wainwright, 483 So.2d at 426. The error here -- barring, due to trial and appellate default, a post-conviction claim of Lockett error which this Court has since recognized should not be barred by default in a case tried before Lockett --unquestionably resulted in the denial of Mr. Foster's fundamental constitutional rights. The right to an individualized determination of sentence through a procedure in which all relevant mitigating evidence is given independent consideration is the most consistently enforced and zealously guarded of any Eighth Amendment right applicable to capital proceedings. As we show herein, Mr. Foster was sentenced to death in disregard of this right. The Court's error in 1981 in precluding review of the violation of this right should not now stand in the way of acknowledging Mr. Foster's legitimate constitutional claim.

STATEMENT OF THE CASE AND FACTS

Case Chronology

6. Mr. Foster was convicted of first degree murder and robbery on October 4, 1975. (RA-33,34)[3]. A jury recommended the death penalty for the murder charge. (RA-43). The Circuit Court of the Fourteenth Judicial Circuit sentenced Mr. Foster to death for the murder charge and to life imprisonment for the robbery count. (RA-44,45). This Court affirmed the conviction and sentence, Foster v. State, 369 So.2d 928 (Fla. 1979), and the United States Supreme Court denied certiorari. 444 U.S. 885 (1979).

7. On May 6, 1981, Mr. Foster filed a motion for post-

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[3] Mr. Foster will cite to record references by the following designations:
(T-): The transcript of his 1975 trial and sentencing.
(RA-): The record on direct appeal to this court from the imposition of the death penalty in 1975.
(R-): The record on appeal from the denial of his first motion for post-conviction relief in 1981.

convicton relief pursuant to Rule 3.850, Fla.R.Crim.P. (R-1-39). The Circuit Judge summarily denied the motion, (R-91), and Foster appealed. This Court affirmed the Circuit Court order. Foster v. State, 400 So.2d 1 (Fla. 1981).

8. Subsequently, Mr. Foster sought a writ of habeas corpus in federal court. The United States District Court for the Northern District of Florida denied the petition following an evidentiary hearing. Foster v. Strickland, 517 F.Supp. 597 (N.D. Fla. 1981). A panel of the United States Court of Appeals for the Eleventh Circuit affirmed denial of the writ. Foster v. Strickland, 707 F.2d 1352 (11th Cir. 1983), cert. denied 466 U.S. 993 (1984). A second petition was then denied by the district court on June 5, 1986. An appeal from that judgment is now pending before the Eleventh Circuit. Foster v. Wainwright (No. 86-3539).

9. A second motion for post-conviction relief raising the sole claim that the trial court's comments to the jury violated Caldwell v. Mississippi, 472 U.S. 320 (1985) was denied by the trial court on January 14, 1987. State v. Foster (No. 75-486). A notice of appeal from that denial was filed in this Court on March 4, 1987. Foster v. State (No. 70,184). The appeal is currently pending.

Material Facts

10. The facts of the murder and robbery for which Petitioner was convicted are contained in the first motion for post-conviction relief (R-2-8). The following facts relate to the statutory constraints on the trial judge and jury's consideration of mitigating evidence.

11. As the sentencing trial commenced, the court explained to the jury that: "At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider." (T-597-8) (Emphasis added). Prior to their sentencing deliberations, he instructed the jurors that "[the] mitigating circumstances which you may consider if established by the

evidence are these," followed by a list of the statutory mitigating circumstances. (T-648-49).[4] He then instructed them to "consider all the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as you feel it should receive in reaching your conclusions as to the sentence which should be imposed." (T-650). After the death sentence was imposed, the trial judge issued the following findings:

> The Court finds, from the evidence, that sufficient aggravating circumstances exist as enumerated in subsection (5) of section 921.141, Florida Statutes, that justify a sentence of death, and that there are insufficient mitigating circumstances, as enumerated in Subsection (6) of said Section 921.141, to outweigh the aggravating circumstances.

(Supp. Record on Direct Appeal, Case No. 48380) (Emphasis supplied).

12. Throughout the course of Mr. Foster's trial, the permissible scope of consideration of mitigating circumstances was articulated in similar terms. Through the comments and arguments of counsel and the additional instructions of the court, the rule communicated to the jury and applied by the judge was that only the mitigating circumstances specified by the Florida Statute could be considered.

13. During voir dire, the defense attorney questioned six jurors in the panel whether they could follow the judge's

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[4] A. That the Defendant has no significant history or (sic) prior criminal activities.
B. That the crime for which the Defendant is to be sentenced was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
C. That the victim was a participant in Defendant's conduct or consented to the act.
D. That the Defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the Defendant's participation was relatively minor.
E. That the Defendant acted under extreme duress or under the substantial domination of another person.
F. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
G. The age of the Defendant at the time of the crime.

(T-648-9). Fla. Stat. Ann. 921.141(6) (1985).

instructions and consider the statutory mitigating circumstances in determining sentence:

> MR. MAYO: You believe you sit there, equally that you would consider the instructions of the court and if [mental or emotional disturbance] was one of the things you could consider you would give that equal weight in a recommendation to the Court?

(T-136) (Emphasis added). All six jurors agreed they could apply the statutory mitigating circumstances as instructed by the judge. (T-136). Later during voir dire the prosecutor echoed that requirement to a new panel of prospective jurors. To qualify as jurors, he explained that they must follow the judge's instructions and weigh the enumerated statutory mitigating circumstances against the aggravating circumstances to determine sentence:

> MR. SYFRETT: Mr. Mayo is correct when he states that if you return a murder in the first degree the trial will go into a second stage for the purposes of you making a recommendation to the Court of life imprisonment or death. Those are the two options available. The Court will instruct you as to the mitigating and aggravating circumstances that you are to consider in that phase of the trial.

(T-141) (Emphasis added).

14. During closing arguments at the sentencing phase, counsel for the state reiterated the jury's limited role in applying only statutory mitigating circumstances in recommending sentence, by advising them that the "statute which sets up this procedure has set up certain things that they, that the statute says are mitigating; certain things they say are aggravating." (T-630). He cast the proffered mitigation as an attempt to prove only one statutory mitigating circumstance, and equated that attempt with the state's burden of proving an aggravating circumstance:

> There are three aggravating circumstances which the State contends are present in this case. Now then these aggravating circumstances that the State contends exist in this case, the three that we contend; we contend there are no mitigating circumstances. There has been some attempt on the part of the defense to introduce the fact that Mr. Foster is sick. Nobody questions that.

(T-630).

15. Defense counsel's closing argument at sentencing also

referred, explicitly and inferentially, to the court's instructions which would limit mitigation to statutory circumstances. (T-635-6,640). He urged the jury to consider the statutory circumstances of mental or emotional disturbance and the defendant's capacity to appreciate the criminality of his conduct (T-640-1). He did not refer to any other considerations relevant to mitigation, or attempt to broaden the jury's conception of mitigation beyond the statutory definition.

ARGUMENT

16. This Court has recently reversed death sentences where the judge and jury were limited in their consideration of mitigating evidence as they were in Mr. Foster's case. Lucas v. State, 490 So.2d 943, 946 (Fla. 1986); Harvard v. State, 486 So.2d 537 (Fla. 1986), cert. denied, 479 U.S. ___ (1986). These cases represent the culmination of an evolutionary process in which this Court has moved from holding that instructions and findings like those in Mr. Foster's case comported with Lockett to holding that they do not. Compare Peek v. State, 395 So.2d 492, 496-97 (Fla. 1981); Songer v. State, 365 So.2d 696, 700 (Fla. 1978)(on rehearing), cert. denied, 441 U.S. 956, 51 S.Ct. 2185 (1979), with Lucas v. State, supra. In Peek, for example, the Court held that instructions directing the jury's attention only to statutory mitigating circumstances did not preclude the jury's consideration of nonstatutory mitigating circumstances. 395 So.2d at 496. In Lucas, however, the Court recognized that where the court "instructed the jurors only on the statutory mitigating circumstances," and defense counsel's argument reinforced the view that only such circumstances could be considered, the jury may well have been limited in its consideration of mitigating circumstances. 490 So.2d at 946 (Emphasis in original). Between the decisions in Peek and Lucas, the Court began to recognize that in directing the sentencer to consider a delimited list of mitigating circumstances, "the

Florida death penalty sentencing law [and instructions pursuant to it] could previously [before the decision in Lockett] have been read to limit the consideration to those circumstances listed in the statute." Copeland v. Wainwright, 12 F.L.W. at 179. With this recognition, the evolution from Peek to Lucas could -- and did -- take place.[5]

17. The correctness of this evolution has recently been confirmed and its conclusion mandated by the United States Supreme Court in Hitchcock v. Dugger, 55 U.S.L.W. 4567 (April 21, 1987). Hitchcock held that instructions to the jury, indistinguishable from instructions given in Mr. Foster's case, unconstitutionally limited the jury's consideration of mitigating circumstances. Further, Hitchcock held that the judge's sentencing order stating that he considered only the statutorily enumerated mitigating circumstances in imposing sentence reflected an unconstitutional limitation of his own consideration of mitigating evidence. Thus, Hitchcock, along with Lucas and Harvard, controls the disposition of Mr. Foster's case.[6]

18. Both the judge and the jury in Mr. Foster's case were constrained in their assessment of mitigating evidence. Instructions given by the court and counsels' arguments interlocked to constrain the jury. The judge's understanding of the law, as reflected by the jury instructions and his written

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[5]Indeed, it is this same evolution that has resulted in the change in the Court's procedural default rule concerning Lockett error in cases decided before Lockett. So long as the Court maintained that the Florida Statute comported in all respects with Lockett, the Court could justifiably expect claims of Lockett error to have been raised at trial or on appeal. With the recognition that prior to Lockett the statute could have been read to limit the consideration of mitigating circumstances, the Court has properly held that defendants tried before Lockett cannot be faulted for failing to raise Lockett-based claims at trial or on appeal. Thus, the Court's recent determinations that Lockett error can properly be raised for the first time in a Rule 3.850 motion by defendants sentenced prior to Lockett is a reflection of the evolution of the Court's Lockett-related jurisprudence.

[6] Lockett's Eighth Amendment prohibition on excluding mitigating evidence is clearly retroactive. Truesdale v. Aiken, 55 U.S.L.W. 3642 (March 23, 1987) (Lockett retroactively applies to error in excluding prison guard's testimony). Thus, Hitchcock's application of Lockett to the Florida sentencing procedure is retroactive. Accord Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(en banc).

findings, constrained him as well.

19. In Lucas v State the trial court had "instructed the jury only on the statutory mitigating circumstances," which impermissibly curtailed consideration of mitigating evidence and required a new sentencing proceeding. 490 So.2d 946. The trial court in Mr. Foster's case also instructed the jury exlusively on statutory mitigating circumstances. (T-650, ¶11, supra). These instructions are functionally identical to those disapproved in Hitchcock. The Hitchcock court instructed the jury that "'[the] mitigating circumstances which you may consider shall be the following . . .' (listing the statutory mitigating circumstances)." Hitchcock, 55 U.S.L.W. at 4569. Mr. Foster's trial judge instructed the jury that "[the] mitigating circumstances which you may consider if established by the evidence are these," followed by the statutory list. (T-648-9). Both instructions define and therefore limit what mitigating circumstances the jury "may" consider. Prior to these instructions, the trial court had already advised Mr. Foster's jury (before the sentencing phase began) that evidence of certain matters in mitigation would be presented, and that he would instruct them later as to "the factors in ... mitigation that you may consider." (T-597-8; ¶11, supra). Since an "examination of the sentencing proceedings in this case" establishes that "the sentencing judge assumed ... a prohibition [against considering nonstatutory mitigation] and instructed the jury accordingly," the jury's consideration of mitigating evidence was constrained in violation of the Eighth Amendment. Hitchcock, 55 U.S.L.W. at 4568.

20. Even more, the jury's belief that it could consider only the specified mitigating circumstances was bolstered by the arguments of counsel, as in Lucas and Harvard. In voir dire the jury's ability to apply statutory mitigating circumstances (and inferentially only statutory circumstances) was made a virtual condition of service, prematurely delineating their reception of evidence in anticipation of their sentencing role. (T-131-195;

¶13, supra). Further, both defense counsel and the attorney for the state argued to the jury at the close of the sentencing trial that the trial court's instructions would limit their consideration of mitigating evidence to statutory circumstances. (T-630,635-6,640-1; ¶¶ 14-15, supra).

21. Similar to Hitchcock, Lucas, and Harvard, the limitation communicated to the jury in Mr. Foster's case was also clearly applied by the judge in the actual determination of Mr. Foster's sentence. The instructions themselves demonstrate "that the sentencing judge assumed ... a prohibition" against the consideration of nonstatutory mitigating circumstances. Hitchcock, 55 U.S.L.W. at 4568. See Lucas v. State, supra; see also Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985) ("An erroneous instruction may ... provide convincing evidence that the trial judge himself misunderstood or misapplied the law when he later actually found and balanced aggravating and mitigating factors"). Moreover, the judge's sentencing findings revealed that he considered only statutory mitigating circumstances in deciding to sentence Mr. Foster to death. As in Hitchcock, "[the judge] described the process by which he reached the sentencing as follows," 55 U.S.L.W. at 4569:

> The Court finds, from the evidence, that sufficient aggravating circumstances exist as enumerated in subsection (5) of section 921.141, Florida Statutes, that justify a sentence of death, and that there are insufficient mitigating circumstances, as enumerated in Subsection (6) of said Section 921.141, to outweigh the aggravating circumstances.

(Supp. RA, Case No. 48380)(Emphasis supplied). There could be no more explicit statement that the judge considered only statutory mitigating circumstances in making his sentencing decision. As this Court has held, "[A]n appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute." Harvard v. State, 486 So.2d at 539.

22. For these reasons, as in Hitchcock, "it could not be

clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances," in violation of the requirements of the 8th Amendment. 55 U.S.L.W. at 4569.

23. In spite of trial counsel's reasonable belief that the jury was precluded from considering nonstatutory mitigating evidence (T-136,635-6,640; ¶¶13,15, supra), significant evidence of nonstatutory mitigation was available, either to the jury or to the judge, before Mr. Foster's sentencing order was entered.[7] This evidence included the following:

(a) The continuous and frustrated attempts of Mr. Foster and his family to obtain treatment for the mental health problems which contributed to his violent behavior (T-625-6);

(b) Mr. Foster's deep sense of guilt and willingness to take full blame for the crime, manifest in his voluntary statements to the Court that "I was drunk but ... being drunk ain't no excuse" (T-657), his apology to the victim's family (T-661-662), his confession on the witness stand (T-463-84, 510-511), and the fact that he voluntarily turned himself in and confessed to the police (T-475);

(c) The lessening of meaningful deliberation and intent to commit murder caused by Mr. Foster's mental problems combined with the effects of alcohol (T-617-18);

(d) Mr. Foster's inability to reflect upon the consequences of his actions, caused by his mental problems combined with the effects of alcohol, (T-617-18).

24. Any possible combination of these factors could have influenced the jury and judge's assessment of Mr. Foster's moral

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[7] As this Court has recognized, nonstatutory mitigating circumstances are often present in evidence admitted for other purposes, and except for the constraints upon counsel, jury and judge, could have been proffered and considered in mitigation in the sentencing proceeding. Harvard, 486 So.2d at 539 ("nonstatutory mitigating factors may arise not only from evidence presented in the penalty phase but also from evidence presented and observations made in the guilt phase of the proceeding").

culpability, rendering their constrained sentence unreliable. The evidence regarding Mr. Foster's mental problems and the influence of alcohol on the crime would have been significant even if the jury found it insufficient to establish the statutory "mental mitigating" circumstances. For example, the jury could rationally have concluded that proof of "extreme mental or emotional disturbance" required evidence along a medical model which trial counsel failed adequately to provide. Yet such evidence, singularly or in the aggregate, could well have influenced a properly instructed jury in making a "reasoned moral response to the defendant's background, character, and crime," California v. Brown, 479 U.S. ___, 93 L.Ed.2d 934, 942 (1987) (O'Connor, J., concurring) (emphasis in original), resulting in a sentence less than death. Mr. Foster's sincere apology to the victim's family and his persistent willingness to accept moral responsibility for the crime could as well have distinguished him from those deserving of death, yet the court and jury were restrained from weighing that distinction, as well as others, in sentencing.

25. In these circumstances, the Court cannot "confidently conclude that [the jury's and judge's consideration of nonstatutory mitigating evidence] would have had no effect upon the jury's [and judge's] deliberations." Skipper v. South Carolina, 90 L.Ed.2d 1, 9 (1986). See also Hitchcock v. Dugger, 55 U.S.L.W. at 4569 (allowing the state to show that Lockett error was harmless, in "that it had no effect on the jury or the sentencing judge"). Mr. Foster's case is not one in which the only reasonable sentence would have been death. While two statutory aggravating circumstances were present, substantial nonstatutory mitigating circumstances were also present. On just such a record, this Court has emphasized, "We cannot know ... [whether] ... the result of the weighing process by both the jury and the judge would have been different" in the absence of factors unconstitutionally skewing the jury's sentencing deliberations. Elledge v. State, 346 So.2d 998, 1003 (Fla.

1977). This is so because

> 'the procedure to be followed by trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present....'

Id. (quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)). Accordingly, this Court "cannot say" that the limitation upon the jury's and judge's consideration of mitigating circumstances had "no effect" on the sentencing recommended and imposed.

CONCLUSION

26. For these reasons, the Court should reconsider Petitioner's appeal from the denial of his first post-conviction relief motion, reverse the denial and remand for a new sentencing proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished by mail to Mark C. Menser, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301, this 26th day of May, 1987.

Richard H. Bunn III

ATTORNEY FOR PETITIONER